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No. 83-559

In the Supreme Court of the United States

OCTOBER TERM, 1983

MASTER PRINTERS ASSOCIATION, A DIVISION OF PRINTING INDUSTRY OF ILLINOIS, PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether application of the disclosure requirements of Section 203(b) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 433(b)) to a trade association that engages in persuader activities violates the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 699 F.2d 370. The opinion of the district court (Pet. App. 11a-39a) is reported at 532 F. Supp. 1140.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1983. A petition for rehearing was denied (Pet. App. 40a-41a) on May 12, 1983. On July 29, 1983, Justice Stevens granted an extension of time within which to file a petition for a writ of certiorari to and including September 26, 1983, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Master Printers Association (MPA) is a trade association composed of non-union print shop employers that counsels and assists its members in keeping their employees unorganized (Pet. App. 11a-12a). In 1976, MPA's executive director gave three speeches to employees of three of its members (*id.* at 12a). These speeches constituted "persuader activity" within the meaning of Section 203(b)(1) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 433(b)(1), which is defined to be "activities where an object thereof is, directly or indirectly * * * to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing." MPA filed the statutorily required 30-day reports (29 U.S.C. 433(b)) disclosing the nature of the agreements it had entered into with the three employers for purposes of engaging in persuader activity (Pet. App. 12a). MPA also filed an annual report under Section 203(b). However, MPA reported only the receipts and disbursements on account of labor relations advice and services rendered to the three employers for whom it had engaged in persuader activities, and it refused to include in the annual report a statement of its receipts and disbursements with respect to other employers to whom it had provided labor relations advice or services in that year (Pet. App. 12a).

2. The Secretary of Labor brought suit in the United States District Court for the Northern District of Illinois to compel MPA to file a complete annual report. The district court granted the Secretary's motion for summary judgment and ordered MPA to comply with the statute (Pet. App. 11a-39a). Following decisions of the Fourth Circuit

and the en banc Fifth Circuit,[1] the court construed Section 203(b) of the LMRDA to require persons or organizations engaging in persuader activity to file an annual report disclosing receipts from, and disbursements to, all employers for whom the persuader provided labor relations advice and services in the fiscal year regardless of whether it had undertaken persuader activity for each such employer (Pet. App. 24a). In addition, the court held that this interpretation of the Act does not violate the First Amendment. Although accepting, for purposes of summary judgment, MPA's allegations that such disclosures would deter employers from associating with MPA and would deter MPA from engaging in persuader activity (Pet. App. 26a), the court upheld the statute because "the scope of the reporting requirement in the Act is tailored to meet a concern articulated by Congress and supported by a compelling state interest" (*id.* at 33a). In particular, the court found that the field of labor relations is "unique and pervasively regulated" (*id.* at 27a), that Congress in enacting Section 203(b) had ample evidence of undesirable conduct by labor-relations consultants, and that the disclosure provisions were designed to protect employees exercising their rights under the National Labor Relations Act from the abuses of management middlemen (Pet. App. 28a-31a, 34a).

The court of appeals affirmed (Pet. App. 1a-10a). Noting that "the district court thoroughly and carefully analyzed all the issues," the court of appeals "adopt[ed] the excellent opinion of the district court" (*id.* at 2a). Judge Pell dissented on the ground that Section 203(b) should be construed not to require persuaders to make disclosures concerning labor

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[1] *Douglas* v. *Wirtz*, 353 F.2d 30 (4th Cir. 1965), cert. denied, 383 U.S. 909 (1966); *Price* v. *Wirtz*, 412 F.2d 647 (5th Cir. 1969) (en banc).

relations advice and services to employers for whom no persuader activities were performed (*id.* at 2a-10a).[2]

ARGUMENT

The decision below does not conflict with any decision of this Court or of any other court of appeals. Moreover, the court's decision is a correct application of settled principles of constitutional law. Accordingly, further review by this Court is unwarranted.

1. Petitioner contends (Pet. 7-10) that the decision below is inconsistent with this Court's decisions in a line of cases holding that compelled disclosure of associational ties may infringe the right of association protected by the First Amendment. *E.g., Brown* v. *Socialist Workers '74 Campaign Committee*, No. 81-776 (Dec. 8, 1982); *Buckley* v. *Valeo*, 424 U.S. 1, 64 (1975); *Gibson* v. *Florida Legislative Investigation Commission*, 372 U.S. 539 (1963); *NAACP* v. *Alabama*, 357 U.S. 449 (1958). Petitioner acknowledges (Pet. 7-8) that disclosure laws are constitutional if the governmental interest they serve outweighs the chilling effect disclosure may have on the exercise of First Amendment rights and if there is "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed" (*Buckley* v. *Valeo*, 424 U.S. at 64 (footnotes omitted) (quoting *Bates* v. *City of Little Rock*, 361 U.S. 516, 525 (1960), and *Gibson* v. *Florida Legislative Investigation Commission*, 372 U.S. at 546)). Petitioner argues (Pet. 8), however, that the courts below misapplied these principles in upholding the constitutionality of Section 203(b).

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[2]Petitioner does not raise the issue of statutory interpretation in this Court and limits its challenge to the constitutionality of Section 203(b) as construed.

The courts below correctly held that Section 203(b) serves a compelling governmental interest. Contrary to petitioner's suggestion (Pet. 8-9), a disclosure provision, to be valid, need not be justified by the government's interest in national security or the "free functioning of our national institutions." Indeed, this Court has held that there is a compelling interest in regulating labor-management relations that justifies even direct, content-based limitations on free speech, and that the free speech rights of employers "cannot outweigh the equal rights of employees to associate freely." *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617 (1969). Cf. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 778-779 (1975) (Stewart, J., concurring) (noting the compelling interest in maintaining "antiseptic conditions in the labor-relations context").

The courts below properly relied (Pet. App. 27a-28a) on these principles in concluding that Section 203(b) is supported by a compelling governmental interest. As the district court explained (Pet. App. 28a, 29a), "[t]he reporting and disclosure provisions of the LMRDA are supported by extensive [congressional] findings of the danger posed by middlemen in the labor relations field * * * [and t]he record is replete with evidence that Congress believed that 'union busting' management middlemen were working with employers to undermine employees in their attempt to exercise their § 7 rights [under the National Labor Relations Act]." See S. Rep. 187, 86th Cong., 1st Sess. 10, 12 (1959); Pet. App. 13a-15a, 29a.[3] Based on its "lengthy" investigation (*id.* at 12a), Congress concluded, as the district court

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[3]The tactics with which Congress was concerned included direct employee contact by middlemen, surreptitious expenditures to distribute distorted information to employees, the creation of company dominated unions, and other practices that Congress believed were unethical if not illegal. S. Rep. 187, *supra*, at 12; Pet. App. 29a.

summarized, that outside consultants "frequently engaged in practices of questionable legality" (*id.* at 14a) and that "those who engage in persuader services had * * * a track record [of illicit or otherwise harmful conduct] in the sensitive field of labor-relations" (*id.* at 32a). Thus, the district court found, in light of its careful review of the extensive legislative record, that "Congress deemed the management middleman who engages in persuasion of employees as inherently suspect; that judgment is supported by adequate findings and operates in a sensitive area of great national interest" (*id.* at 34a).[4]

Moreover, Section 203(b) is substantially related to the furtherance of the compelling governmental interest in national labor relations (Pet. App. 30a-31a). The disclosures required by the Act to be made in annual reports enable employees to know the true nature and interests of the consultant that is attempting to persuade them to exercise their protected rights in a particular way, and it is relevant to this end to reveal not only the consultant's persuader activity but also its other labor involvement. In addition, this disclosure allows the Department of Labor to determine whether the consultant has correctly characterized its conduct as persuader activity or mere advice, a determination that calls for careful review in light of "the difficulty in distinguishing between those activities that are persuader activities and those that are not, and * * * the opportunity for misleading concealment of the true nature of [the consultant's] work in situations involving intricate

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[4]It is no answer, as petitioner asserts (Pet. 12, 14), that its activities may be entirely lawful. Rather than proscribing or limiting persuader activities, Congress chose to subject them to the scrutiny of public disclosure. Thus, "[t]he fact that persuader contact and advice is not itself illegal is not dispositive. What counts is that Congress found a strong connection between corruption in the labor field and the activities of management persuaders" (Pet. App. 29a-30a).

corporate conglomerate associates or, equally pressing, industry-wide labor controversies." *Price* v. *Wirtz*, 412 F.2d 647, 650 (5th Cir. 1969) (en banc). Furthermore, such disclosure in the annual report notifies the Department of Labor of consultant-employer relationships that may require the submission of a 30-day report under the Act and also serves as a cross-check on the 30-day reports that have been filed. Finally, the disclosure alerts the Labor Department, the National Labor Relations Board, and unions to the potential involvement of a third party in the commission of unfair labor practices or other tactics that undermine the employees' rights to choose their own representatives. All of these considerations in support of complete disclosure assume special significance in view of "the congressional conviction that * * * the persuader business was detrimental to good labor relations and the continued public interest * * * [and that persuaders are involved in a] legislatively suspect field" (*Price* v. *Wirtz*, 412 F.2d at 650).[5]

These justifications for disclosure are, as the district court observed (Pet. App. 30a), "remarkably similar" to the justifications for disclosure of campaign contributions and expenditures upheld in *Buckley* v. *Valeo*, 424 U.S. at 66-68.

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[5]The fact that petitioner is a well-known employer association engaged in persuader activity (Pet. 9) does not exclude it from the disclosure called for by the Act. Both the government and employees are entitled to be kept informed of petitioner's continuing activities and to evaluate its labor practices and compliance with the law. "Disclosure is therefore justified as a means of discouraging potential abuse where there is a demonstrated propensity for such abuse [in the field of persuader activity]" (Pet. App. 30a), and "this exposure [must] include not only the fact that the consultant was paid by management, but why he was paid, how much he was paid, and the practices he engaged in to earn his pay." *Wirtz* v. *Fowler*, 372 F.2d 315, 324-325 (5th Cir. 1966), rev'd on other grounds, *Price* v. *Wirtz*, 412 F.2d 647 (5th Cir. 1969) (en banc) (footnote omitted). Accordingly, disclosure by petitioner of the details of its labor activities is necessary to further the public-scrutiny purpose of the Act.

Thus, disclosure under Section 203(b), like disclosure of campaign contributions and expenditures, serves to deter corruption, allows employees to know the source of their information, and acts as "an essential means of gathering the data necessary to detect violations of [other requirements of the statute]" (424 U.S. at 68). As the courts below correctly concluded, Congress's judgment as to the proper scope of the reporting requirement in Section 203(b) is not unconstitutional.[6]

2. Contrary to petitioner's contention (Pet. 13-14), the decision below does not conflict with *Thomas* v. *Collins*, 323 U.S. 516 (1945). In *Thomas*, a state statute required labor union organizers to register before presenting any public speech soliciting union membership, and the state sought to enforce the statute by obtaining a temporary restraining order against a union organizer. This Court held that such a prior restraint on speech violated the First Amendment (323 U.S. at 540). In contrast, disclosure provisions such as Section 203(b) do not constitute a prior

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[6]Petitioner also argues (Pet. 12-13) that the courts below employed " 'unduly strict requirements of proof' " in considering its allegations that compelled disclosure would subject members to " 'threats, harrassment, or reprisals from either government officials or private parties' " (Pet. App. 12[illegible] quoting *Brown* v. *Socialist Workers '74 Campaign Committee*, slip op. 6, and *Buckley* v. *Valeo*, 424 U.S. at 74)). However, the courts below explicitly accepted petitioner's allegations as true in resolving the issues it presented (Pet. App. 26a). In any event, petitioner's general allegations of a chilling effect (see *id.* at 26a & n.11) do not approach the factual claims that were involved in *Brown*, including threatening letters and phone calls, the burning of Socialist Workers Party literature, destruction of members' property, police harassment, firing of shots at a Socialist Workers Party office, the politically motivated firing of 22 party members, and a history of surveillance by the FBI and various government agencies (slip op. 12-15). As the district court concluded (Pet. App. 26a n.11), "[t]he allegations of chill here, while they are not inconsequential, fall far short of the sort of threat of physical harm and loss of employment found in NAACP v. Alabama and its progeny."

restraint. See *Buckley* v. *Valeo*, 424 U.S. at 81-82. Rather, they are valid if they reasonably serve a compelling governmental interest. Because no prior restraint is involved in this case, the court of appeals' decision is not in conflict with *Thomas* v. *Collins*.

Nor does the decision below conflict, as petitioner argues (Pet. 10-12), with *Familias Unidas* v. *Briscoe*, 619 F.2d 391 (5th Cir. 1980). In that case the court of appeals held that a Texas statute requiring public disclosure of the members of any organization that interferes with the peaceful operation of the school system is unconstitutional on the ground that the governmental interest in maintaining peaceful schools is not served by disclosure of members who did not participate in and had no knowledge of the organization's illicit goals. The LMRDA disclosure provision at issue in this case is clearly distinguishable from the state statute in *Familias Unidas*.[7] Section 203(b) is not directed to membership in an association, but rather focuses on the activities of management consultants. "Merely belonging to [petitioner MPA] does *not* require reporting" (Pet. App. 32a (emphasis in original)) and the prescribed reports do not call for the fact of membership to be indicated. Instead, it is only because of their "specific relationship — some type of labor relations contact—" with a persuader organization that petitioner's member employers are implicated in the required disclosure as part of the congressional objective of "keeping an eye on those who engage in persuader activity—here the Association itself" (*id.* at 32a-33a). Furthermore,

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[7]We also point out that the en banc Fifth Circuit has construed Section 203(b) to require persuaders to make complete disclosure of their labor activities notwithstanding the argument raised in dissent that such an interpretation posed "constitutional difficulties" (*Price* v. *Wirtz*, 412 F.2d at 656 (Dyer, J., dissenting)). In view of the decision in *Price* v. *Wirtz*, it is most unlikely that the Fifth Circuit would conclude that its holding in *Familias Unidas* conflicts with the decision below and requires that Section 203(b) be declared unconstitutional.

as discussed above, Congress determined that the suspect activities of persuaders justified the disclosure of all of their labor relations contacts and practices. Compare 619 F.2d at 401 (*Familias Unidas* did not involve organizations "having a demonstrated track record of illicit conduct"). Thus, unlike in *Familias Unidas*, Section 203(b) does not seek or require the disclosure of purely passive and innocent membership in organizations with no substantial history of activity that the legislature found to be harmful to the public interest.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] *Familias Unidas* is also distinguishable because the court there found (619 F.2d at 395-396) specific record evidence of reprisals by both private citizens and public officials against members of the organization, as well as a decline in membership caused by the government's request for a membership list. Compare Pet. App. 26a & n.11; page 8 note 6, *supra*.